

Service Date: June 29, 1998

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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IN THE MATTER of the Investigation)	UTILITY DIVISION
into U S WEST Communications, Inc.'s)	DOCKET NO. D97.5.87
Compliance with Section 271(c) of the)	
Telecommunications Act of 1996.)	ORDER NO. 5982e

ORDER ON AT&T'S MOTION TO COMPEL DISCOVERY RESPONSES

1. On May 15, 1998, AT&T Communications of the Mountain States, Inc. (AT&T) filed a motion to compel U S WEST to respond to data requests filed by a number of parties, including AT&T (the Joint Intervenors). AT&T noted that U S WEST was responding to the Joint Intervenors' data requests, but stated that the other parties in the Docket were significantly hampered in their ability to prepare testimony and file it by the date required by the procedural schedule. U S WEST responded to that motion by asserting that the Rules 26, 33, and 34 of the Montana Rules of Civil Procedure "evinced a legislative policy of generally restricting discovery" and arguing that the Commission should not allow this proceeding to be halted. U S WEST stated it was responding in good faith to the voluminous discovery requests it had received, but that it could not meet the deadline for such responses that had been established in the Procedural Order in this Docket, Order No. 5982b.

2. Other problems developed which required a modification of the procedural schedule to accommodate U S WEST's inability to respond to many of the data requests prior to

June 5, 1998. U S WEST agreed to defer its filing of a "271 application"¹ with the Federal Communications Commission until the end of September to accommodate the problems which had arisen with discovery. The hearing was vacated and rescheduled to begin on August 17, 1998. U S WEST has submitted supplemental and additional responses to data requests, many received too late by intervenors for purposes of preparing their testimony.

3. On June 11, 1998, AT&T filed a Renewed Motion to Compel U S WEST's discovery responses, alleging problems falling into four categories: (1) U S WEST has failed to respond at all to certain data responses, (2) U S WEST has withheld other information, claiming that the information is privileged, (3) U S WEST filed incomplete responses to certain data requests, and (4) U S WEST has provided nonresponsive answers to certain data requests. U S WEST responded that it was providing responses to some of the data requests contemporaneously with its response to the motion (received by the Commission on June 16, 1998), that it was asserting the attorney-client privilege with respect to three data requests, that it would provide supplemental responses to others, and that as to still others, it stands by its responses and does not understand why AT&T considers them deficient.

4. The parties were able to resolve some of the discovery issues prior to the work session the Commission held on June 23, 1998 to address AT&T's renewed motion. U S WEST has provided responses to some of the requests and AT&T has determined that many of the

¹ An application pursuant to 47 U.S.C. § 271 for an RBOC to be permitted to enter its in-region interLATA long distance market.

responses will be sufficient. However, the parties were not able to resolve all issues. These are addressed below with respect to particular data requests.

DISCUSSION

Data requests 18, 48 and 49:

5. U S WEST refused to provide complete responses to these data requests, asserting that they are protected by the attorney-client privilege. AT&T states in its motion that the data requests filed by AT&T and other Joint Intervenors included instructions requiring that U S WEST identify any privileged material it was refusing to produce so that the Joint Intervenors could test the claim of privilege. AT&T cited § 26-1-803, MCA, and State ex rel. U.S.F.&G. v. District Court (1989), 783 P.2d 911, 240 Mont. 5, to support that the attorney-client privilege is limited in scope, applying only to protect communications made in confidence to an attorney by a client seeking legal advice.

6. Data requests 48 and 49 request U S WEST to identify outside consultants or third parties who have analyzed the performance of the service centers responsible for processing orders received by U S WEST from new entrants and production of documents relating to consultant reviews of service centers, respectively. Data request 18 requests information regarding testing of U S WEST's Operational Support Systems (OSS).

7. AT&T contends that information regarding U S WEST's interconnecton service centers and OSS is clearly relevant to the determination of whether U S WEST can provide nondiscriminatory access to its systems as required under § 271 of the Telecommunications Act of 1996. AT&T further argues that it is difficult to imagine any basis for withholding this kind of information as privileged attorney communications, because consultation regarding OSS testing

or service center performance is not "legal" in nature nor is it protected by the attorney-client privilege.

8. U S WEST responded that its attorneys had retained consulting experts "to aide in the preparation for litigated proceedings"; although some of the work of the consulting experts touched upon areas covered by the Joint Intervenors' data requests, the experts were retained and/or supervised by attorneys and reported all results to attorneys for assistance in preparation for litigation. According to U S WEST, the work of such consulting experts is clearly privileged pursuant to Rule 26 of the Montana Rules of Civil Procedure and the attorney-client privilege.

9. The Commission disagrees with U S WEST. First and primarily, consulting experts' work is not privileged merely because attorneys have retained or supervised its preparation. The limited scope of the attorney-client privilege prevents a party from asserting it for improper reasons merely because its attorney hired and/or supervised the experts. Further, if information or documents cannot accurately be described as "legal" advice, they are not protected by the attorney-client privilege. Kuiper v. District Court (1981), 634 P.2d 694, 193 Mont. 452.

10. The attorney-client privilege is a qualified immunity. The question is whether the document or information sought can fairly be said to have been prepared due to the prospect of litigation. Clark v. Norris (1987), 734 P.2d 182, 226 Mont. 43. The attorney-client privilege cannot be created in a document merely by transmitting it to an attorney. The protection for corporate records is determined by the corporation's purpose in having the reports prepared. Id.

11. An example of a situation in which the attorney-client privilege applied to a utility's reports is a case where a claim arose for negligence allegedly caused by Montana Power Company as a result of a natural gas explosion in a restaurant. Day v. Montana Power Co.,

789 P.2d 1224, 242 Mont. 195 (1990). Montana Power Company had one of its employees prepare a report concerning the explosion and its possible liability for damages as a consequence of the explosion. This report was privileged because the purpose for its preparation was the anticipation of litigation.

12. The rule authorizing the use of interrogatories for pretrial discovery from an adverse party is to be liberally construed to make all relevant facts available to parties in advance of trial in order to assure a decision on the facts as they actually exist. Generally, evidence of testing is discoverable. However, one Montana case holds that where thousands of inspections and tests had been performed by a great number of people employed by the manufacturer, interrogatories requesting the names of specific persons involved in testing and inspection during the year in question were overbroad and burdensome and refused on that basis, not because of the attorney-client privilege. Rix v. General Motors Corp. (1986), 723 P.2d 195, 222 Mont. 318.

13. U S WEST cites Burlington Northern R.R. v. District Court (1989), 779 P.2d 885, 239 Mont. 207, to support its argument. That case held that a party should not have been required to produce the identity of nonwitness experts where the opposing party made no showing of exceptional need for the information. This is consistent with treatment of attorney work product material that is privileged. U S WEST argues that the information requested in data requests 18, 48 and 49 is privileged because its attorneys retained an expert in preparation for litigation. Although materials prepared in anticipation of litigation may only be discovered upon a showing "that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means," we do not agree that the materials here

were prepared in anticipation of litigation. as contemplated by Rule 26(b). *See* Rule 26(b)(3), Montana Rules of Civil Procedure. Even if the materials could be classed as such, they are still discoverable if the party seeking them is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Information acquired in the ordinary course of business is discoverable; however, any material which reflects attorney thought processes is excepted. Burlington Northern, 239 Mont. at 217. There is no indication here that the materials were not prepared in the ordinary course of business or that they involve attorney thought processes.

14. The Commission denies U S WEST's objections and grants AT&T's motion to compel responses from U S WEST with regard to data requests numbered 18, 48 and 49.

Data Requests Nos. 64, 124, 125, 129:

15. U S WEST asserts it is burdensome to produce the information requested and that the information is available to the Joint Intervenors from other sources. Data request 64 asks for performance standards included in interconnection agreements in other states. Number 124 requests information about any orders other state commissions have issued directing U S WEST to fulfill its obligations under the 1996 Act. Number 125 asks about fines for failure to comply with state commission orders in the last five years; 129 asks for information about service quality penalties and investment in the last five years.

16. We conclude that this relevant information should be provided by U S WEST. U S WEST is in a better position to provide this information than are the Joint Intervenors. Although it is public information, for the Joint Intervenors to obtain the information would take a

substantially greater effort than for U S WEST to provide it. AT&T's motion is granted and U S WEST's objection is denied.

Data Requests Nos. 78 and 178:

17. Data Requests numbered 78 and 178 ask for information about costs that U S WEST will incur and/or impose for use of its SPOT (Single Point of Termination) frame that it has proposed for access to unbundled network elements (UNEs). U S WEST has provided information about the manner in which it will make UNEs available with its SPOT frame proposal, but has not provided cost information. We agree with AT&T that both the manner of making it available and the cost for doing so are key issues in this proceeding. Cost information is relevant and must be provided by U S WEST. The Commission grants AT&T's motion and denies U S WEST's objections.

Data Request No. 77:

18. Data Request 77 asks whether there are combinations of UNEs that U S WEST will provide in combination and to identify each combination. U S WEST's response to 77 sets forth all the UNEs it will provide and describes what they include. U S WEST has not answered what it is willing to provide in combination; its answer is nonresponsive.

19. The Commission grants AT&T's motion to compel a responsive answer and denies U S WEST's objection.

Data Request No. 141:

20. Data Request 141 asks about U S WEST's internal performance measurements-- what performance measurements U S WEST uses for CLECs and if U S WEST calculates or monitors their accuracy. U S WEST responded with information that its measurement results are

a result of software programming which is reviewed from time to time, or are sometimes computed manually (the method varies); that its performance measurements for Montana have not been assembled at this time and the measurements U S WEST tracks for Montana are in witness testimony. The answers are nonresponsive to the question asked. AT&T's Motion to Compel a responsive answer to 141 is granted.

Data Request No. 175:

21. Data Request No. 175 asks for documents that describe the process flows discussed. U S WEST responded that it has the process flows and discusses them, but it did not produce the documents requested. Its answer in that respect is nonresponsive. The Commission grants AT&T's motion to compel a responsive answer to Data Request 175.

ORDER

THEREFORE, based on the foregoing, the Commission grants AT&T's Motion to Compel with respect to Joint Intervenor's Data Request Nos. 18, 48-49, 64, 77-78, 124-25, 129, 141, 175, and 178. IT IS ORDERED that U S WEST respond to these data requests as discussed herein without further delay.

DONE AND DATED at Helena, Montana, this 23rd day of June, 1998, by a vote of 4-0 for Data Requests Nos. 18, 48-49, 77-78, 141, 175 and 178; and by a vote of 3-1 for Data Requests Nos. 64, 124-125 and 129.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

DAVE FISHER, Chairman

BOB ANDERSON, Commissioner

DANNY OBERG, Commissioner, dissented in part

BOB ROWE, Commissioner

ATTEST:

Kathlene M. Anderson
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See ARM 38.2.4806.